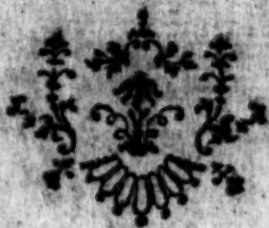


15 Nov 4

S U M M A R Y
O F T H E
L A W O F L I B E L:
I N F O U R L E T T E R S.

S I G N E D
P H I L E L E U T H E R U S A N G L I C A N U S.

Addressed to, and printed in,
T H E P U B L I C A D V E R T I S E R,
By H. S. W O O D F A L L.



L O N D O N:
Printed for S. BLADON in PATER-NOSTER ROW,
M.DCC.LXXI.

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OF THE
LAW OF LIBEL:
IN FOUR LETTERS



THE PUBLIC ADVERTISER
BY H. S. WOODGATE

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Ch. Hargrave

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S U M M A R Y
O F T H E
L A W O F L I B E L.
L E T T E R I.

To the Printer of the PUBLIC ADVERTISER.

S I R,

Dec. 12, 1770.

I Mean to trouble you with some few Observations and Doubts which have occurred to me upon the late Adjudications in the Cases of Almon and Woodfall. I am a speculative and not a practising Lawyer, for which Reason it may very possibly happen that I may be imperfectly informed of what passed, or judge inaccurately if truly instructed. However, I shall utter my own Sentiments sincerely, dispassionately, and uninviciously, presuming that the learned Bench discharged honestly the Duty of their Offices, whether their Opinions be well or ill founded in Reason and Law.

B₂

I have

I have always understood that it was a first Principle in the English Constitution, and the great Security of the Persons of those who live under it, that no Man could be found guilty of any *Crime* but by a *Jury*, and that this extended through the whole Region of Crimes, from Trespass and Misdemeanor to Homicide and High Treason. The Law must arise from the Fact, and on that Account must go with it to the Jury: It is therefore the Duty of the Judge, after the Facts have come out, when he sums up, to direct the Jury as to the Law, that is, to point out to them what he infers to be the Law, from the Facts proved. This is done that the Jurors may have every Thing before them, both the Facts and the Law, in order to form a proper Conclusion, whether the Defendant, upon the whole, is or is not guilty of the Crime charged upon him. *His* Plea is the general Issue, and *their* Verdict is guilty or not guilty. The Judge can in no Case pronounce an Englishman guilty of any Crime; it is his Country alone that can do it. The Prosecution is at the Public Expence for the Benefit of the Community, and the Power of finally judging whether any Person arraigned be criminal or not is left to themselves. The Oath of the Jurors is that they "shall well and truly try, " and true Deliverance make between the " King and the Prisoners, whom they shall " have in Charge, according to the Evidence."

" dence." The Charge is what the Indictment or Information lays to the Defendant, and the Evidence thereof is either internal, springing from the Nature of the Act itself, or external, what proceeds from outward Proof. And No-body can be tried *criminally* but for a Crime.

Libel being the Misdemeanor which I have in View, and that Species of it which is only denominated a *Public* or *State* Libel, I shall confine myself to that alone. It is a Crime which is agreed to be undefinable, for it may arise from a Multitude of variable Circumstances, and no particular Words constitute it; but whatever Writing falsely, maliciously or seditiously vilifies the State, is allowed to be so and no other. Good Words made use of ironically will, and bad Words applied jestingly will not, be a Libel. The Intent and Design are what must determine in every Case. For it is not the Injury which they may have produced, but the Criminality of the Producer, that is to be tried. If Damages or Reparation be sought by the Sufferer, a civil Suit is the Means of obtaining it; if Punishment be aimed at, it must be for some Offence against the Public Peace, and the Person prosecuted must be proved to be criminal in his Intent. A Defendant in *Libel* indicted or informed against can plead no Justification, so that he cannot on Demurrer have the Opinion of the Court whether the Writing, charged as a Libel, be

so or not in Point of Law; but he must go to Issue upon it, because the Crime, and consequently the Criminalness of the Defendant, depends upon and results from the Nature of the Act.

This being the Case, the whole Proceeding is agreeable thereto. The Information charges the Defendant with being a Libeller, in having falsely maliciously and seditiously put forth such a Paper. He, as all other Criminals, puts himself for Trial upon his Country. The Jurors, who are this Country, are sworn to try this Charge. The Crown Counsel tell them the Defendant is charged with the Crime of a Libel, they state the Writing, and endeavour to shew the Jury that it is a false, wicked and seditious Publication; the Counsel of the other Side as uniformly attempt to disprove the Conclusion of their Adversaries and to persuade the Jury of the contrary. And after this is over, the Judge, in summing up, constantly makes Observations upon the Paper, gives the Jury his Opinion that it is a Libel and the Reasons why. If the Jury bring in the Defendant guilty, the Clerk before recording their Verdict applies again to them thus: "Well then, you say A. B. " is guilty of the Trespass or Misdemeanor " in Manner and Form as he stands informed against or indicted, and so you say all?" And the Foreman answers for them *Yes*. Whereupon the Verdict is drawn up "*The Jurors*

" Jurors do say upon their Oaths that A. B.
 " maliciously in Contempt of the King and
 " the Government and to raise Sedition pub-
 " lished such Book against the Peace, &c.
 " &c."

But (*Credat Judæus Appella!*) it is said that whether Libel or not, and every Thing relative to the criminal Intent, is Matter of Law and must therefore be *left to the Court*, notwithstanding all these outward and visible Tokens to the contrary. Nay, by the late Judgment in *Woodfall's Case* it is said to be a Matter which is not before the Jury, with which they have nothing to do, and if they ground their Verdict professedly upon it, such Verdict will be vitiated thereby. In short, a finding of *Not Guilty* upon the Crime (that is, upon the Merits) is a Nullity and can *no Way affect the Verdict*. And as an Argument in Support of this new Doctrine, it is alledged that if the Jury should find a Defendant guilty, he may move in an Arrest of Judgment that the Paper he was charged with and found to have published was no Libel, and the Court will enter into a Consideration of the Matter, and, if they think that in Point of Law it does not amount to a Libel, will arrest the Judgment, which they could not do in that Mode were it Matter of Fact.

To these Objections there are various Answers, which, separately taken, would satisfy a plain Man, and collectively carry the Force

Force of Demonstration. If the criminal Intent be not before the Jury, then there is no *Trespass or Misdemeanor* at all before them, because there is no Harm in Publication, Blanks or Asterisks, abstracted from the criminal Drift thereof; and then it would be the Judge and not the Jury who would find the Defendant guilty of the Crime. But this is contrary to the Fundamentals of the English Constitution, which require that no Man shall be found guilty of any Crime but by his Peers; and incompatible with the Proceeding, at the taking of the Verdict, above stated. It is inconsistent with the Information itself being read to them as their Charge, and their being sworn *to try and true Deliverance make thereon according to the Evidence*. For Evidence is whatever evinces or makes to be seen the Truth of any Proposition, whether from Reason or from Testimony; and *true* or effectual *Deliverance* is to pass their Judgment upon the whole of the Charge, as they have sworn to do. Moreover, if the new Doctrine be true, that their judging about the Crime would *vitate and annul their Verdict*, all the Judges, who have tried Libels for this last Century, from the Time of Lord Chief Justice *Hyde* down to the present, even *Scroggs* and *Jefferies*, have transgressed their Duty. They have all let Counsel tell the Jury, that the Crime for which the Defendant was to be tried by them was a Libel, and enter into Proofs of it's being

ing so; and they themselves have all uniformly done the same Thing, and, after telling the Jury their Opinions, that the Publication was a Libel, have concluded with saying *it is left to you Gentlemen* (as the *State* and all other printed Trials uniformly demonstrate.) *If the Jury have nothing to do with it*, such Discourse is absurd and impertinent; nay, mischievous and criminal, if it will vitiate the Verdict and render it a Nullity. Nay, the Information has always been vitiously drawn, inasmuch as it has ever accused the Paper of being a *false, malicious and seditious Libel*, and submitted it to the Jury under that Description, and as the Crime of the Defendant for which he was to be tried. I have indeed heard that of late, by special Order, the Word *false* has been left out; but, if the new Doctrine be just, the Words *Libel, malicious and seditious* should be likewise left out, because by standing they *must* mislead a Juror who listens to his Charge and his Oath. The Clerk should be directed in lieu of asking the Jury "Well then you say the Defendant is *guilty* of the *Trespass* and *Misdemeanor* as he stands *indicted*," to ask them, "Well then you say he is the Publisher of the Paper set forth, and that he means by the Blanks and Asterisks what is interpreted thereof as he stands charged therewith." For the Words *Guilty, Trespass, Misdemeanor*, and *Indicted*, import that they have been trying him as a Criminal

Criminal and for some Crime. There is also one farther Alteration in the Proceeding which will be requisite, and that is in recording this Verdict. Instead of the Form hitherto used, "The Jurors say upon their Oaths that the Defendant *maliciously and seditiously and against the Peace* published such Paper," it should be that he "published such Paper, and by the Blanks and Asterisks meant what is interpreted thereof by the Information." The Fact would then be clearly all that was left to the Jury, with the slight additional Matter of the Meaning of the *Hiatus's*; and the general Intention and Criminality of the Publication would be reserved to the Bench.

Under the Doctrine of the Day, all this is so clearly right, that it must have taken Place long ago, had not Judges known that whether any Man be a Criminal or not, none but his Peers can adjudge, let his Criminality be deduced from Law or Fact, or from a Mixture of both.

As to the flimsy Objection that were not this solely a Matter for the Judges to determine, they could not arrest Judgment after a Verdict, there is nothing in it. In all other Crimes, whether capital or not, where nobody disputes that the criminal Intent is left under the Direction of the Judge to the Jury, the same Thing may be done, and Motions may be and are daily made in Arrest of Judgment. If there be any legal Defect

fect in the Record in setting forth and charging the Crime, it may be taken Advantage of. The Principle of our merciful Constitution is, that every Thing shall incline in Favour of the Accused. If he be acquitted by a Jury, it shall be final, he shall never be put in Jeopardy again for the same Crime; but if he be found guilty, yet if there be discovered any Flaw in the Indictment, he shall not be debarred from moving thereon in Arrest of Judgment, notwithstanding the Verdict against him. And this is no peculiar Grace to Mr. Woodfall the English Bookseller in *Libel*, it is equally open to Mr. Lookup the Scotch Gambler in *Perjury*. The Intent in one Crime is as much a Matter of Law as in another; there is no Difference: The Criminality of the Deed, be it what it will, upon the State of the Fact by the Evidence, and under the Remarks, Advice, and legal Instruction of the Judge (usually called his Directions) is left to the Jury, and the Words *guilty* or *not guilty* can be pronounced by no other Power whatsoever. In fact, they never have been. And this is the true Reason why Judges finally leave the Construction of every Act, tried as a Crime, and *Libel* in particular, to the Jury, notwithstanding they very commonly tell them that they ought to follow the Directions of the Court therein, because the Intent is an Inference of the Law. The Pretence, therefore, that this is not before them, or left

to them, is a Novelty, and contradicted by all the printed Trials.

In my own Opinion too, whether any Act be malicious or seditious, no Lawyer can determine so well as a Man who knows more of the World, of the Company, Friends, Family, Turn, Views, Inclinations, and Grudges of the Actor. There is nothing technical, professional, or abstruse in the Matter. And as a small Proof of this, no one, among the many Lawyers, who have called it a Matter of Law, has yet been able to shew what Maxim, Rule, or Position of Law it depends upon. If it be really Matter of Law, the same Paper must be a malicious and seditious Libel, whether written by a Philosopher withdrawn from the World, or by a factious Member of Parliament, or Mr. Wilkes. And yet the one may ground himself innocently upon some public Relation of Misfeasance in the Ministry which he takes to be true and write from his Heart, and the other may know the Story to be a Lye, but choose to make use of it for the Sake of calumniating a Set of Men for the Purpose of serving some private End. Would any Man, however, say that the criminal Intent was the same? And if it were not, the one is an innocent Man, and the other a Libeller. The former can only be answerable in a civil Suit for any Damages he may have occasioned, but the latter is penally answer-

answerable to the Public for a Crime against the State.

For fear of being too long, I will now close this Letter, but you shall soon hear from me again, because I am at a Loss to know with what Propriety the Doctrine, so much complained of, and delivered as Directions at the Trial, could be confirmed by the Court of King's Bench upon *Motions* merely in Consequence of the *Verdict*; also how the Sentence in Almon's Affair can be justified.

I am, SIR,

PHILELUTHERUS ANGLICANUS.

LETTER II.

SIR,

Dec. 13.

IN my former I endeavoured to prove from the Nature of the whole Proceeding in *Libel*, and from the universal Practice, that the Criminality, whether it be a Matter of Law or Fact, has always been left to the Jury. Even *Scroggs*, *Jefferies* and *Holt* conformed to this, although the two former filled the Office of Chief Justice of England, towards the Close of the Domiaion of the Stuarts, and the other in the warmest Times

after the Revolution, and were all three Persons inclined to a high Strain of Government. *Pemberton*, who succeeded *Scroggs*, I do not mention, because he was a moderate Man; but *Wright* Chief Justice to James the 2d, who presided at the Trial of the seven Bishops, Royalist and High-flier as he was, may be noted as a signal Instance of the Truth of my Assertion. And the Authorities I appeal to are the *State Trials*, where the Subject has never had more allowed him than was his Due. This is irrefragable as to the Usage. Now could such Conduct be held by the first Lawyers of the Time, and yet be impertinent, or even questionable as to Propriety and Legality? The Assertion is too strong to be received at once, upon a single Authority.

Lord *Mansfield* long ago learned from the antient Orators, that in the judiciary Kind of Eloquence it was required in the first Place to establish a Crime committed, then to shew of what Nature that Crime was, and lastly who was the Perpetrator of it. Therefore, one would conceive, that until a Libel was proved to have been made, a Jury could not find any body guilty of making it. However, the present King's Bench seem to have reversed the old Rule. For they say (if my Understanding does not play the Truant with me) the Attorney General may *inform ex officio* against any Man as a Criminal for publishing any Paper, the Jury, if the Publication

tion be proved, must find him *guilty*, and then the Court will determine whether the Paper be a Libel or not, that is, whether any Crime at all has been committed. The Logic, the Law, and the Humanity of the Doctrine seem to me to be so equal, that I cannot tell which preponderates. In the Name of *Common Sense* can any Judicature find the Criminal before the Crime. *Non datur reus sine crimine*. The former must depend upon and cannot precede the latter. Moreover, it is obviously an Untruth to say that "by a Verdict of *guilty of printing and publishing only* the Jury have found the "very Crime they were to try," unless printing and publishing without Malice or Sedition be a Crime, which nobody will take upon him to advance.

The Case of the Bishops is equivalent to an hundred Cases, not only from the Magnitude of it's Object, and the Weight of it's Royal Prosecutor, but in being a Trial at Bar before the whole Court. There all four Judges concurred in leaving the criminal Intent to the Jury, and two of them expressly declared this to be a Matter of Fact, and not an Inference of Law. Almost all the other Trials were at *Nisi Prius*, and prove only the Opinion of one Judge. But there is not a single Instance in the first six Volumes of the *State Trials*, which are all that have been published with any Degree of Authority, where both Counsel and Judge do
not

not expatiate to the Jury upon the Libellousness of the Paper in Question. In *Tutchin's* Case for printing *The Observators* in 1704 (the Year of Lord Mansfield's Birth) my Lord *Holt* sums up to the Jury in these Words: " Gentlemen of the Jury, this is
 " an Information for publishing Libels against
 " the Queen and her Government," and then, after stating the Proof of the Publication, and reading some Passages from the *Observators*, he goes on, " so that now you
 " have heard *this* Evidence, *you are to con-*
 " sider whether you are satisfied that Mr.
 " *Tutchin* is guilty of writing, composing and
 " publishing these Libels. They say they
 " are innocent Papers, and nothing is a Li-
 " bel but what reflects upon some particular
 " Person. But this is a very strange Doc-
 " trine, to say it is not a Libel reflecting
 " on Government, endeavouring to possess
 " the People that the Government is male-
 " administered by corrupt Persons, that are
 " employed in such or such Stations either
 " in the Navy or Army: For it is very ne-
 " cessary for all Governments that the Peo-
 " ple should have a good Opinion of it.
 " And nothing can be worse than to endea-
 " vour to procure Animosities as to the
 " Management of it: This has been always
 " looked upon as a *Crime*, and no Govern-
 " ment can be safe without it be punished.
 " Now you are to consider whether these
 " Words I have read to you do not tend to
 " beget

“ beget an ill Opinion of the Administration of the Government ?” Even in *Harris’s* Trial in 1679, where *Scroggs* was the Judge, and *Jefferies* Counsel for the Crown, they both insisted to the Jury upon Arguments to prove the Publication a Libel, and as a Demonstration, that then it was understood both Law and Fact went to the Jury, the Chief Justice, upon their withdrawing, said to them, “ If there be any Thing in Law, let me know it before you go out.” In 1680, in *Carr’s* Trial, the same Judge and Counsel acted the same Part, although they advanced the Doctrines of late regenerated. Nevertheless they neither of them went so far as to lay down that “ the Jury, “ if they found *the Publication*, by adding “ they did not find the Paper a Libel, or “ did not find the Epithets, or did not find “ any malicious Intent, could not affect the “ Verdict, because none of these Things “ were to be found one Way or other. Nor “ did they say that the Fact of Publication “ found by the Jury was the very *Crime* “ they were to try ; therefore clearly there “ could be no Judgment of Acquittal, and “ Judgment ought to be entered for the “ Crown.” The desperate Judges of *Charles* and *James* never ventured this Length. However, it will not be unworthy the Reader to regard some of the Doctrines of that Day, as they will shew the Source and the Tendency of what is now advanced. In
Carr’s

Carr's Trial my Lord Scroggs was pleased to
 say, " Gentlemen, I had rather Mr. Carr,
 " with all his Faults about him, should go
 " away with Applause, and have him found
 " not guilty, than do him Wrong in one
 " Circumstance; for *I come to try Causes*
 " *according to Truth of Fact; I come not to*
 " *plead of one Side nor another*; not to con-
 " demn Men that are innocent, nor to ac-
 " quit them, if they are guilty. Now, it
 " remains for you to consider what Proofs
 " you have, as to this particular Book.
 " You very well know that Evidences of
 " Fact are to be expected according to the
 " Nature of the Thing. We are fain to
 " retreat to such probable and conjectural
 " Evidence as the Matter will bear. Even
 " for Men's Lives, you have very often not
 " a direct Proof of the Fact, of the actual
 " killing, but yet you have such *Evidence by*
 " *Presumption*, as seems reasonable to Con-
 " science. Certainly *that* should govern in
 " Offences, and especially when of a Nature
 " that reflect upon *Government*. As for
 " those Words *illicite, malitiose*; I must re-
 " cite what all the Judges of England have
 " declared. When by the King's Command
 " we were to give in our Opinion what was
 " be done in Point of the *Regulation of the*
 " *Press*, we did all subscribe, that to print
 " or publish any News-books or Pamphlets
 " of News whatsoever is illegal; that it is a
 " manifest *Intent to the Breach of the Peace,*
 " and

“ and they may be proceeded against by
 “ Law. Suppose now that this Thing is
 “ not scandalous, what then? If there had
 “ been no Reflection in this Book at all, yet
 “ it is *illicite*, and the Author ought to be
 “ convicted for it. And that is for a pub-
 “ lic Notice to all People, and especially
 “ *Printers and Booksellers*. Now for the
 “ Subject Matter. It was fillily writ, if he
 “ did not believe *we* understood it; it must
 “ be with an Intent People should know
 “ what Reflections he made; and shall all
 “ Mankind know, and shall *they* that try
 “ the Cause not know it? If you find him
 “ guilty, and say *what* he is guilty of, we
 “ will judge whether the Thing imports
 “ Malice or no. There are some Things that
 “ do not necessarily imply Malice in them.
 “ If this Thing does not imply it, then the
 “ Judges will go according to Sentence: so
 “ that it concerns you not one Farthing, whe-
 “ ther malicious or not, that’s plain. Now,
 “ there remains only whether or no he was
 “ the Publisher of this Book? For *that* you
 “ must take Evidence in this Case, as you
 “ do all the Year along. You do not swear,
 “ nor are you bound to swear here, that he
 “ was the Publisher; but, if you find him
 “ guilty, you only swear you believe so.
 “ *His Boy* brought these Papers to be print-
 “ ed. If you can’t say he sent him, *you*
 “ *can give no Verdict while you live*, if you
 “ expect that. The Printer says he knew
 “ no other Person in the World that had
 D “ any

" any Pretensions to be the Author, and if
 " he were the Author, no Doubt but he is
 " the Publisher." However, this Chief
 Justice very shortly fell under an Inquiry of
 the House of Commons for his Administration
 of Justice. In the Trial of Sir Samuel
Barnardiston in 1683, my Lord Jefferies lets
 the Counsel harangue upon the Libellousness
 of the Letters written by Sir Samuel, and
 does himself the same through Three fourths
 of his Speech to the Jury. However, he
 asks " How any Man shall prove another
 " Man's Malice that lies in his Mind, but
 " from his Actions? And declares in In-
 " formations for Offences of this Nature
 " *falsely, maliciously and seditiously* are the for-
 " mal Words; if the Nature of the Thing
 " be such as necessarily imports Malice, Re-
 " proach and Scandal to the Government,
 " there needs no Proof but of the Fact done,
 " the Law supplies the rest. If the Fact
 " were indifferent in itself, then to make a
 " Crime of it, the accidental Circumstances
 " must be proved." Nevertheless he makes
 the criminal Intent the first Head of his Ad-
 dress to the Jury, leaves it fully to their
 Consideration, and tells them, " Gentlemen,
 " the Question before you is, whether the
 " Defendant be guilty of writing these ma-
 " licious, seditious Letters, for that they
 " are malicious and factious, no honest Man
 " can doubt in the least, and I do not find
 " that the Counsel do offer to say any thing
 " in

“ in Defence of the Letters.” He then states the Proof of the writing and publishing, and concludes thus “ So that, Gentlemen, this Information surely (if ever any was) is fully proved, as it is laid, in all the Parts of it. The Question you are to try is only, whether the Defendant be *guilty* of this *Offence* or not guilty. It is a Matter of great Consequence, and that has made me take so much Notice of the Tendency of Things of this Nature, that we may learn to beware of these Men. They are Traitors in their Minds.” The wonderful Conformity between some of the above Reasoning and that in a late Judgment need not be pointed out; indeed the whole of the latter is derived from the two last mentioned Chiefs. However, *Jefferies* fairly left both Law and Fact to the Jury, and fell as much short of *Scroggs*, as this last hath done of Lord *M.*; and yet the Conduct of Lord Chief Justice *Scroggs* gave Rise to the celebrated Treatise of Sir John *Hawles* on the Trust and Duty of petty Juries, and to that of Lord *Somers* on the Power and Jurisdiction of Grand Juries, as well as to a parliamentary Impeachment.

PHILELEUTHERUS ANGLICANUS.

L E T T E R III.

THE Solemnity with which the late Opinion is cloathed by being called a Judgment of the Court of King's Bench, made me desirous of knowing how it became so, and who gave it that Name. A Friend told me that it was owing to Lord Mansfield, and asked me whether I did not recollect the Court condemning General Warrants, without having any Matter before them whereby they necessarily became an Object of Consideration; that was a Precedent for this. There were two Motions made to the Court in consequence of the Verdict in the *King against Woodfall*, the one was, "to stay the entering up of Judgment on the Verdict," and the other "that the Verdict might be entered according to the legal Import of the finding of the Jury." On the latter Motion the Counsel were encouraged to go into what passed at the Trial, and the Chief Justice declared it was necessary to report the whole.

Now these Things pass my Understanding. Because nothing can be requisite for the Court to determine such Motion, but the Charge, the Plea, and the finding of the Jury. It was known and is allowed to be clear Law that the Verdict must be entered in

in the Words it was delivered, and “ no Affidavit of a Juror can be read as to what he then thought or intended. There is no Ground from any Thing which passed to explain the Sense of the Jury.” The Words after being received must speak for themselves. “ And therefore it is a Question of Law upon the Face of the Verdict.” The Report of the Evidence, the Arguments of Counsel, or Directions of the Judge, cannot be of any Use. No such collateral Matter ought to be admitted. The Court cannot travel out of the Record in quest of something to ground their Opinion upon: They must confine themselves to the very Words of the finding, applying them to the Information and Plea, and then see what will be their Effect. Every Thing else is Matter *dehors*, and can only tend to mislead and to give a wrong Bias.

Such Report therefore was unnecessary and impertinent, the Legality of the Judge's Directions was not in Judgment before the Court, and they could not give any Opinion thereon without doing what was extrajudicial and irregular; and consequently this Determination was a rash and a voluntary Act, and can carry no legal Authority whatever with it. Did not we know that Lord Mansfield's Practice needs no Support, one would be tempted to suppose that these Directions were first slid in upon the Court for the Sake of procuring their Sanction, and afterwards into a superior Judi-

Judicature for the like End. But that cannot be, for it is said that “ the Law as there
 “ stated has been so often unanimously agreed
 “ by the whole Court, upon every Report
 “ made by Lord Mansfield of a Trial for a
 “ Libel, that it would be improper to make
 “ it a Question now. And that among those
 “ that concurred, the Bar may recollect the
 “ Dead and the Living not present.” Now
 Sir, under these Circumstances I should be
 glad to know in what one Case this ever
 happened.

Nothing but a Motion for a new Trial, upon the Ground of Misdirections to the Jury, could bring the Matter before the Court. Inform me, therefore, if you can, in what one Cause this hath taken Place within the last fourteen Years. From the Expression I suppose it must have fallen out very frequently; and my Non-attendance at the Bar has been the Occasion of no Instance coming to my Knowledge? The Discourse among the Brotherhood at their Computations is so totally extrajudicial and so incapable of being ascertained that *this* cannot be what is meant.

But if what was ruled in the *King against Woodfall*, be intended, as I conceive it is, for a compleat Code of the Law in Libel, I am surprized to read in the News Papers, that the noble Penner hath declined answering some plain Questions put for the more clear Ascertainment of his Doctrine, and its binding

ing Force as a Judgment. When four Months had been taken finally to settle it, and it was officiously intruded upon the great Word as complete, the Intimation of a Doubt about its Meaning, especially from a Peer of the same Profession, should have produced an immediate Explanation. But *that* is refused, and the Opinion is to remain a Dark-lantern for political Application hereafter. It was asserted in another Place, that the Noble Judge avowed to every Body his Adjudication, and wished for nothing more than an Opportunity of fully declaring it, for the Sake of Certainty in so agitated a Question. All this only serves to shew the Man! For an explicit Resolution of the Queries must and will come, after six Weeks more Consultation, and one or two farther intermediate, ambiguous Answers.

To recapitulate for a Moment. *Scroggs*, our Prototype, in 1679, talks of Law and Fact in Libel, the one for the Jury and the other for the Court, but sums up both to the Jurors. Being grown stouter in 1680, he tells them they have nothing to do with the Law and must be bound by the Court's Directions with respect to it; nevertheless he states to them shortly the Nature of the Libel, and does not keep it absolutely from them. The House of Commons fall upon his Lordship, (whom *Burnet* represents as a plausible Speaker, an indifferent Lawyer, and a Man of no Principles,) and we hear
no

no more of him. *Pemberton* his Successor, professedly submits both Law and Fact to the Inquest. *Jefferies*, who was put into his Place, re-declares the Law to be the Province of the Court alone, but nevertheless lays both that and the Fact *fully* before the Jury. Lord Chief Justice *Wright* acts like *Pemberton*. Thus stood the Matter under the *Stuarts*. The Revolution takes Place, and *Holt* for 20 Years treads in the Steps of *Pemberton* and *Wright*. However, it seems that *Raymond*, who had been Solicitor-General to Queen Ann's Jacobite Administration, when he became Chief Justice, renewed, in 1731, the Positions of *Scroggs*, by telling the Jury they had nothing to do with the Libellousness of the Paper, and in the King against *Franklin* (Printer of *the Craftsman*) only summed up the Evidence of the Publication and of the Interpretation of particular Words, commonly called the Innuendoes. But, it is observable that the Attorney-General of the Time, Sir Philip York, although he asserted *Libel or not* to be a legal Consideration, yet went at large into Reasons to satisfy the Jury that the Paper in Question was really a Libel; and this Conduct of his, under such a Judge, is a convincing Proof of his own Opinion, that the whole ought, under the Direction and Instruction of the Court, to go to the Jury. *Lee* for sixteen Years conducted himself, without Reproach, like *Pemberton*, *Wright*, *Holt*, and *Hardwicke*.

wicke. Then comes Lord Mansfield, who unites the Principles of *Jefferies*, with the Manner of *Scroggs*, and the Conduct of *Raymond*, and, after fourteen Years, procures his whole Court to sanctify this Conduct, and even to go one Step farther, and to declare, that if a Jury find the Fact of Publication, and the Innuendoes, but say the Defendant is not guilty as to the Libel and criminal Intent, such latter finding will be of no Effect, and a general Verdict of *Guilty* must be entered, for a Jury cannot, if they will, take upon them to judge of the Law and the Fact. This Adjudication makes a Noise, and the Public grow alarmed. His Friends say he has only trod in the Steps of his Predecessors, the Doctrine has been invariable, and my Lord *Raymond* in the *K. and Franklyn*, is an Authority in Point. This single Instance of one Judge, at *Nisi Prius*, with-holding the Determination of the Criminality of the Paper from being inquired into, is at once erected into a solemn Judgment in Point, and called the uniform Usage of Judges; and then the noble-Lord, sinking altogether the other Novelty of declaring that a finding of *Not Guilty upon the Libel* would signify nothing, cries out, *Quid feci, ubi lapsus!* at most, *Error communis facit jus!* His Friends triumph, and he confidently brings forth the Sum of his Doctrine, saying, *Conscia mens recti; non civium ardor prava Jubentium mentem quatit solam.* His

Summary, however, of Libel Law being couched in ambiguous Terms, and hypothetical Positions; his Lordship is desired to say explicitly what he means, he grows indignant and contemptuous, refuses and protests against any compulsory *Examination upon Interrogatories*, though framed by a Lawyer, and professed to be *for his own Exculpation*, as an Injury to the *Liberty and Freedom of a Peer*. And here we all are at present, in Amazement, Uncertainty, and Confusion. Nothing more therefore can be said upon this Head.

PHILELUTHERUS ANGLICANUS.

LETTER IV.

S I R,

LET me now consider for a Moment what the Court of *King's Bench* did in the Case of *Almon*. He is prosecuted by Information *ex officio* for vending the Republication of Junius' first Letter. The Museum, which contained this Letter, is proved to be sold by his Shopman. The Judge (Lord Mansfield) tells the Jury this is presumptive Evidence against the Master, and conclusive if not answered. One of the Jurors doubts whether the Master, who was absent,

absent, might know of this Sale, and asks whether in a criminal Case, he is at all Events bound to pay so much Regard to such presumptive Evidence as to convict upon it, unless answered by other Evidence? His Lordship declares he is. The Juror submits, finds the Defendant guilty, but is dissatisfied in his own Conscience, and swears nothing could have made him concur in such Verdict, but the being positively told that such Evidence was conclusive upon him. The Defendant immediately files Affidavits to prove his Absence, and Ignorance of the Publication, and that so soon as he knew it, he forbade the Sale, and returned the unfold Copies. The Republisher and his Printer swear that Junius' Letter was inserted without the Defendant's Knowledge, and his Name put to the Cover without his Privity or Consent, and that so soon as he discovered it he sent a Note expressing his Dislike, and desiring his Name might not appear there in future. The Defendant himself swears to his not being at home when the Musæums were brought to his Shop; that when he came in and observed his Name to them, he immediately sent a Note to the Publisher complaining of it, and soon after, perceiving Junius' Letter there, he directly gave Orders for stopping the Sale, ordered the remaining Copies to be put into the Garret, and returned them the first Opportunity. Another Bookseller swears it was customary to put

the Names of the Brethren in the Trade to a Title-Page without asking Leave. Morris, a Barrister, swears to his calling at the Defendant's for one of these Museums, not thinking *Junius's* Letter a Libel, but was refused, although he was a Supporter of the Bill of Rights, and well known to the Defendant as such, and although the Copies were not then carried back; and that he immediately afterwards bought one at a neighbouring Bookseller's; adding also, that whilst he was in the Defendant's Shop a Stranger called for the same Purpose, and was in like Manner refused. And the Defendant's Shopman swears his Confirmation of all these Particulars. Four Months after this, the Defendant is called upon to receive Judgment, when these six Affidavits are read anew and stand uncontradicted. Lord *Mansfield* retires, and my Lord Commissioner Aston pronounces the Sentence of the Court. In his doing of this he takes Notice that

“ the Defendant had been found guilty of
 “ publishing a most wicked, seditious and
 “ malignant Libel; and had been *fully*,
 “ fairly and legally convicted; but the King
 “ wanted not to oppress his Subjects with
 “ Cruelty, he meant only to correct their
 “ ill-sprung Errors. The Court were of
 “ Opinion the Affidavits of the Republisher
 “ and of the Defendant *lessened his Guilt*;
 “ they did not attend to the others, and
 “ would pay no Regard to the Affidavit of

Morris

“ *Morris* who could declare (though in a
 “ Parenthesis) that *Junius’* Letter was not a
 “ Libel; but that the *Booksellers* in future
 “ might not plead Ignorance, it was ne-
 “ cessary to repete that *the bare Fact of Pub-*
 “ *lication was sufficient Conviction.* The At-
 “ torney General could not be blamed for
 “ pushing his Prayer for Judgment in this
 “ Cause.” The Sentence upon the Defen-
 dant was a Fine of 10 Marks, and to be
 bound over for his good Behaviour for two
 Years, himself in 400l. and Sureties in 200l.
 each.

One may observe that a Jury could not
 be much inclined to favour Almon, who
 could find him guilty as a Criminal, with-
 out direct Proof, upon a Presumption drawn
 from the Act of his Servant, whilst he him-
 self was absent. The Admissibility of such
 Evidence in criminal Law might be ques-
 tioned. And most certainly it was not con-
 clusive upon them, if admitted. They
 might from some Circumstances within
 their own private Knowledge have formed a
 contrary Presumption and have found the
 Defendant not guilty. And if they were di-
 rected otherwise, they were misdirected.

But, be this as it may, after the Affida-
 vits had been read, it was clear that Almon
 was free from any criminal Intent or Design
 of libelling; he stood acquitted *foro con-*
scientiæ, although convicted by Law. He
 was perfectly innocent in the Eyes of the
 Court.

Court. Indeed I do not understand at any Rate how a Man found guilty upon mere presumptive Evidence can be said to have been *fully* convicted. But nothing excites my Astonishment so much as the Rejection of a Lawyer's Affidavit, in point of Fact, because he has differed from the Court in point of Law. The Deponent it seems is a young Man, warm in Party, and much with the Supporters of the Bill of Rights. In such Circumstances he may easily be transported to look upon animated Papers against the Administration with Approbation, and from the Prejudice of the Times to think nothing too bad can be asserted of the Government. He may persuade himself that the whole is corrupt, pernicious, and arbitrary, from the Top to the Bottom, both in Principle and Practice. At his Age too it is very probable that the Enthusiasm of Liberty, which young Men contract at the University, from reading the Republican Authors of Greece and Rome, may not be quite worn out. And he may verily think that Junius gives every Man no more than his Due, that no Rank or Station is above Animadversion, and that Truth can never be a Libel. Now, if this be his sincere Opinion, and that it is possible I am well assured from what I know of very sensible Men in particular Points, and no Man can be certain it is not; what can excuse the setting aside his Affidavit? Is the Court warranted to pronounce the

the Deponent perjured? and yet this they virtually do. There seems to be no Foundation or Justification for such Conduct. Because a Man is swayed in speculative, disputable Opinions by Party or Company, does that destroy his Credit in plain Matters of Fact? The Injustice of such a Proceeding with respect to the Defendant is very great, because Mr. *Morris's* Affidavit was extremely material; but the infamous Imputation thrown upon a Gentlemen of Education, Parts and Fortune, from such slight Grounds would scarce be pardonable in Mr. *Rigby* or a Set of jolly King's Men over Claret, and must be a lasting Reproach to a Bench of grave Judges in the sober Office of Judicature. Nothing that he can write will be too severe a Return for such hasty and violent Calumny. So extravagant a Censure is a Disgrace to the Robe of Magistracy. For the Honour of decried Juries I believe no twelve Laymen could be found who would err so widely from the simple Line of impartial Justice. The King's Bench know that Mr. *Morris's* Opinion was not singular; for two Juries, that is, twenty-four good and indifferent Men, had declared themselves of the same Sentiment. Were all these perjured? Well then, was Mr. *Morris* under any Bias of Interest? There is no Pretence for the Suggestion. And I will venture to affirm, his deposing that *Almon* refused him, who was a Friend and Acquaintance,

quaintance, the *Musæum*, when he called, and also a Stranger in his Presence, so confirms the Truth of *Almon's* Justification that such Deposition could not be set aside, and Justice done to him.

The Sentence is not only irreconcilable to any Principle of Equity or Law, but is destructive of itself, or *felo de se* as a Lawyer would say. If the Man was so criminal as to justify the laying him under a Recognizance of 400l. for his good Behaviour for two Years, his Fine ought to be heavy. How disproportionate and inconsistent is such enormous Surety with a Mulct of 6l. The Inequality or Iniquity is apparent. In short, there was no Pretense for the taking of any Surety in such a Case. But *that* was the sole Object; for, if he will print no more political Pamphlets, he suffers nothing from the Sentence. The Fine or immediate Punishment is trifling. The Trouble of Prosecution and the consequent Charge of 140l. which *Almon* was put to, are the actual Hardships. It is impossible to vindicate this Sentence in any Light; and it ought to produce a parliamentary Inquiry, a Resolution against excessive Sureties for the Behaviour, and an Act of Parliament for the Purpose. No Man can give a Reason for this Recognizance. It is Oppression, to use a mild Term. In short, it looks like an Opportunity taken to revenge some old Grudge for a former Publication, and to be done

done upon a Principle of regulating the Press, that is, of laying it under a Restraint. And in truth a Court that can inflict such Sentences would do well to stop the Press entirely. This Sort of Judicature means to gag it. But if the Judges of the King's Bench are to keep the Keys of the Press, and to be an Office of Inquisition, it is very needful that they should have the Power of excluding Juries from judging whether Books are malicious or seditious, and the Authors or Publishers of them Criminals or not. I do not discommend therefore their Attempt to reserve to themselves the Power of adjudging the Crime. The same Persons will then *find* the Bookseller guilty and set the Fine upon him, which will be extremely contributory to the End in View. Indeed they can do nothing, unless they can compass this, and with it they may do what they please. At present Mr. *Almon* cannot forfeit his Recognizance, before he be convicted of some fresh Offence by a Jury; for, I do not think Lord *Mansfield* will declare that a Contempt of his Court (for which he might attach Mr. *Almon*) and much less of the Persons of any of it's Judges, would be, within the Meaning of the Law, a Forfeiture *ipso facto* of such Recognizance. Nevertheless I am never sure what his Lordship, if so inclined, may not pronounce to be Law. If he once can convict a Man of a Crime, which no Jury ever had before them, there is no Part of the legal Frame of this Constitution which he may not mould to his own Fancy; and, if the Juries are not to judge whether any Pa-

per be a Libel or not, I am sure a Man may be convicted of a Crime, without a Jury's finding him guilty of it, that is, in spite of his Peers and Country. If the finding of *printing and publishing only*, where the Publication was charged to be a Libel, be not an Acquittal, but a Verdict of guilty, it must be the Judge and not the Jury who convict the Defendant of the Crime. By the way in the Case of *Woodfall* the Court said they grounded their Award of a new Trial upon the Incertainty occasioned by the Word *only*, because it might imply a Doubt concerning the Innuendoes or some of them at least, which they allowed were Matter for the Consideration of the Jury. But as Mr. *Morris* has shrewdly observed, that could not be the Reason with my Lord Commissioner *Aston*, for he declared that "the Jurors, if they find any Act of Publication, must find not the *simple Fact of publishing* that *Public Advertiser* sold at the Defendant's House, but *that very Libel charged in the Information.*" In fine, if once Directions or Instructions in point of Law touching the Fact, in criminal Trials are not to be left to the Judgment of the Jury, in the Words of *Milton*, "Law and Compulsion grow fast upon those Things which were governed heretofore by Exhortation," and the Liberty of the Press will be but a Name. But, I trust, Men will not in a plain Matter suffer themselves to be talked out of their Senses. Let us remember Ship-Money and the concurrent Opinion of the then Judges.